UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CERVECERIA MODELO DE MEXICO, S. de R.L. de C.V.,

Plaintiff,

v. 21 Cv. 1317 (LAK)

CB BRAND STRATEGIES, LLC, et al.,

Defendants.

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New York, N.Y.
June 16, 2021
2:15 p.m.

Before:

HON. LEWIS A. KAPLAN,

District Judge

APPEARANCES

SULLIVAN & CROMWELL, LLP
Attorneys for Plaintiff
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(Case called)

THE DEPUTY CLERK: Counsel for movant, are you ready?

MR. ATKINSON: Yes, your Honor.

THE DEPUTY CLERK: Please put your appearance on the record.

MR. ATKINSON: Stefan Atkinson of Kirkland & Ellis, and I represent the defendants in this case. With me at the table are Sandra Goldstein and Sara Tatum, also of Kirkland.

THE COURT: Good afternoon.

THE DEPUTY CLERK: Counsel for respondent, are you ready?

MR. STEINBERG: Yes. My name is Michael Steinberg, counsel for Cerveceria Modelo de Mexico. With me is my partner Mark De Leeuw and Colin Hill. Also on the phone, your Honor, for us is Raul Escalante Martinez for Modelo, and present in the courtroom is Pedro Romero, also from Modelo.

THE COURT: Good afternoon.

All right. Then I will hear from Mr. Atkinson first.

MR. ATKINSON: Thank you, your Honor.

Just to note as well for the record, Kristen Klanow, associate general counsel from Constellation Brands, is in the courtroom as well.

THE COURT: OK.

MR. ATKINSON: In their license agreement, your Honor, the parties defined capital B Beer to include beer or malt

beverages, as well as any version of either. And yet, despite this expansive and varied definition, ABI has built its case around the claim that Corona Hard Seltzer qualifies as a big B beer only if the guy in the pub thinks it tastes like traditional beer. But big B beer includes explicitly malt beverages, which don't taste like traditional beer at all. Take Mike's Hard Lemonade, Smirnoff Ice, and Zima. These are sweet, carbonated drinks that don't taste like traditional beer. They do taste like Corona Hard Seltzer, by the way.

ABI's principal claim here, therefore, that the Court should apply "a guy in the pub" test is dead on arrival under the plain language of the contract because big B beer includes malt beverages.

The federal government, at least 35 different states, and the parties themselves, all use the terms beer or malt beverage to include sugar-based hard seltzers. In light of this, it is not plausible that when these highly sophisticated parties expressly defined capital B Beer to include beer, malt beverages, and any versions of either, they excluded Corona Hard Seltzer.

The overwhelming industry practice is to treat Corona Hard Seltzer as a beer or a malt beverage. And a version of a beer or a malt beverage --

THE COURT: Could you moderate your speed, please.

MR. ATKINSON: Sorry, your Honor.

A version of a beer or a malt beverage clearly includes a beverage that the regulatory authorities treat as beer or malt beverage, that are labeled as beer right there on the can, and that industry participants themselves call beer.

To rule for Anheuser-Busch in this case, the Court would have to conclude that, in drafting a broad and expansive definition of capital B Beer, that includes not just beer and malt beverages, but even any versions of beer and malt beverages, the parties silently departed from the overwhelming regulatory and industry terminology and practice.

THE COURT: Overwhelming but not unanimous, right?

MR. ATKINSON: That is correct, your Honor.

THE COURT: What you really ought to focus on is why the interpretation placed on the contract by your adversary is so unreasonable that I should dismiss the case at this point.

MR. ATKINSON: Sure, your Honor. I am happy to.

I will start with the regulatory backdrop.

ABI does not dispute that Corona Hard Seltzer is regulated as a beer under federal law. ABI also does not dispute that Corona Hard Seltzer is a beer under New York's regulatory regime. And ABI doesn't dispute that at the time the agreement was signed, at least 35 states would have considered Corona Hard Seltzer as beer.

As the Supreme Court held in *Robinson* long ago, "Parties who contract on a subject matter concerning which

known usages prevail, by implication incorporate them into their agreements, if nothing is said to the contrary." And to overcome that conclusion, your Honor, there must be clear evidence on the face of the contract that the parties rejected the generally understood industry definition.

Contracts among sophisticated participants in a regulated industry have to be assessed from that perspective under settled Second Circuit law.

Your Honor, given this backdrop, it is unreasonable for ABI to be arguing that Corona Hard Seltzer is not a beer or a malt beverage. When you add the "any versions" language, which the parties did expressly in their agreement --

THE COURT: When you add what?

MR. ATKINSON: The "any versions" language, the expansive catch-all beyond.

THE COURT: What is a version of a beer?

MR. ATKINSON: So we have included in our briefing a definition of version that I think the parties have agreed on, which is "a particular form --

THE COURT: Something tells me I wouldn't put money on that.

MR. ATKINSON: It's one of the few areas of agreement, actually.

And then, of course, Mr. Steinberg can tell me if I am not right about that.

"A particular form of something differing in certain respects from an earlier form or other forms of the same type of thing."

THE COURT: So on that basis, presumably, chardonnay is the same. It's beer, right?

It differs in some respects. It's liquid. It has that in common. It has alcohol in it. You can sort of see through it most of the time.

MR. ATKINSON: That's correct, your Honor.

THE COURT: And it differs in other versions, in other respects.

MR. ATKINSON: The parties in negotiating this contract, of course, they were sophisticated industry players. In this industry, there are three categories of alcoholic beverages: Beer, wine, and distilled spirits. I don't think anybody sitting at the negotiating table was concerned that wine would be captured in the definition of beer.

THE COURT: Counsel, I don't know who was sitting at the negotiating table. I don't know how sophisticated they were.

MR. ATKINSON: Understood, your Honor.

THE COURT: I don't know, for that matter, whether what happened with this definition, is what has happened in any number of deals that I have seen as a judge, as a lawyer, is not that the negotiators came to a hard point, and they fudged

hoping it would never be an issue. And that's why their litigation partners do very nicely, thank you.

MR. ATKINSON: But, your Honor, at the time, there was no Corona Hard Seltzer. So we are talking about a world in which the parties decided that -- the parties decided after being prodded, of course, by the Department of Justice -- that Corona's marks had to be divested in order for the ABI/Modelo merger to be.

THE COURT: It wasn't divested.

MR. ATKINSON: It was licensed.

THE COURT: It's a limited license.

MR. ATKINSON: It is, your Honor. But it is perpetual and Modelo may not terminate it.

THE COURT: So?

MR. ATKINSON: The marks are still owned by Anheuser-Busch, but they are licensed on a perpetual basis to Constellation. And the parties, in coming to their agreement as to the scope of that, did not mention a single ingredient of beer, and, of course, gave the parties rights not just to a license --

THE COURT: I don't know if they mentioned ingredients in the course of negotiating.

MR. ATKINSON: The contract certainly has no reference to any ingredients.

THE COURT: Agreed.

MR. ATKINSON: But the contract also talks about innovating entirely new recipes, and includes the expansive any versions of beer or malt beverage. Under Anheuser-Busch's argument, it has to already be a beer or malt beverage in order for it to qualify as a version of a beer or malt beverage.

THE COURT: And beer is defined as beer in your contract.

MR. ATKINSON: Capital B Beer is not defined as beer in our contract. It includes malt beverages, which are not beer. They don't look like beers --

THE COURT: Beer is defining beer.

MR. ATKINSON: I think -- Mr. Steinberg can tell us -- Corona Refresca doesn't look and taste and smell like a beer, but it is undeniably permitted under the contract. This is the malt beverage that Corona makes.

Corona Hard Seltzer, remember, your Honor, is labeled as beer, as in Bud Light Seltzer. There is an industry understanding here. But, your Honor, even if we set aside the industry understanding, which we, of course, do not concede, *Hugo Boss* is clear that we can consider the customs and usages --

THE COURT: You have to have evidence of customs and understandings.

MR. ATKINSON: So there is evidence of the custom and understanding, I think, here. A few pieces of evidence.

For one, this was a divestiture remedy in the form of a license, and it was a U.S.-based license. Federal law defines this term "beer" broadly to include Corona Hard Seltzer. I think that's not disputed. The parties selected New York law to govern the contract. New York regulatory law likewise defines beer to include Corona Hard Seltzer.

34, let's call it, other states, at the time of contracting, considered beer -- had a definition of beer that captured Corona Hard Seltzer.

THE COURT: What about the other 15 states?

MR. ATKINSON: Sure. The other 15 states are a little bit all over the place. Many of them have now moved to a place where their definitions cover Corona Hard Seltzer as well. But, your Honor, if the agreement permits Constellation to make versions of beer, and versions of malt beverage, clearly, it's enough that 35 states in the federal government consider it beer.

THE COURT: Why?

MR. ATKINSON: If there were one or two that considered it beer, we would have a good argument that these are versions of beer. But it is beer under, for example, Minnesota law, or Connecticut law, or New York law. This is a version of beer.

Of course, we aren't in that world. We are in a world where the overwhelming majority of regulators treat this

product as beer. But we don't need 35 in order to show that this meets the definition of a version of beer. In many states this is beer.

So when the parties against that backdrop negotiate a license that includes references to beer, malt beverages, and any version of beer --

THE COURT: Let me put a hypothetical to you, a not-so-hypothetical hypothetical.

You think you know what forgery is?

MR. ATKINSON: I think so.

THE COURT: OK. Is a check, a corporate check, signed by an officer, authorized to sign corporate checks, for the purpose of stealing the money forged, within the meaning of an insurance policy that insures against loss through forgery?

MR. ATKINSON: Is forgery defined in the insurance contract?

THE COURT: No.

MR. ATKINSON: I guess I would have to understand, the general understanding of the term "forgery," does that include passing yourself off as someone else only, or does it include passing your off as the right person but for nefarious purposes? I guess I don't know enough about forgery.

THE COURT: You're focused on part of the right issue, but states are all over the place. Most would say, I guess, that you have got to imitate a signature, but others don't.

And the Second Circuit says that's ambiguous in terms of forgery.

MR. ATKINSON: How about if the contract said, any version of forgery, any type of forgery? I think in that case, if you could point to a bunch of state law provisions that made forgery applicable in these circumstances, it's hard to see how the version of forgery in that hypo is ambiguous. Forgery may be.

And, by the way, your Honor may conclude that beer is ambiguous, or that malt beverage is ambiguous. Given the industry practice here, the concept that a version of beer, or a version of malt beverage, would be ambiguous, when 35 states treat this as beer, when the federal government treats this as beer, when ABI has a website that says "a guide to our beers" that includes ABI Bud Seltzer, that we have our Cervecerias and it includes Corona Hard Seltzer, that on the side of the can that my friend here bought today it literally says the word "beer."

THE COURT: And when officers of your company said Corona Hard Seltzer is not beer.

MR. ATKINSON: I don't know that that's a direct quote. But I will say --

THE COURT: It's close enough.

MR. ATKINSON: It is true that Anheuser-Busch has found a few contemporaneous statements that perhaps didn't put

it as directly as possible. But I would contest, when you read the earnings calls that they have cited and that we have attached, I think it's clear that Constellation considers seltzer as a subcategory of beer. They talked regularly, including quotes in the complaint, about seltzer not pulling customers away from their core beer franchise. Of course, if there is a core beer franchise, there must be some beer franchise that is not core.

THE COURT: Maybe it's a core beer franchise in the sense of the core of their business being the traditional Budweiser labels and so on that we all know. I don't mean Budweiser, but you know what I mean.

MR. ATKINSON: The point is these are additive. We have the federal government's definition. We have 35-plus states, including the state the parties chose to govern the contract. We have their website. We have our website. At the very least, this is a version of beer. But, by the way, your Honor, we don't even need just beer. We can be a version of malt beverage and still qualify.

So, your Honor -- and I will slow down -- malt beverages include Mike's Hard Lemonade, Smirnoff Ice, ABI has a very sweet drink called Bud Light Lime-a-Rita, and Constellation, of course, has Corona Refresca, which Anheuser-Busch concedes, in its brief at page 11, citing to its complaint at page 37, is permitted under the license agreement.

The only difference between malt beverages like Corona Refresca, that indisputably fall within the agreement, and Corona Hard Seltzer is that Corona Hard Seltzer is brewed from a sugar base rather than a malt base. In fact, Corona Hard Seltzer is a gluten-free version of a malt beverage. It is a malt-free malt beverage. Just like gluten-free pizza is a version of pizza, gluten-free cookies are a version of cookies, gluten-free bread is a version of bread.

ABI claims that malt is the key ingredient in malt beverage. Even if that's true, your Honor -- and, by the way, the agreement certainly does not say that -- aren't yeast and wheat key ingredients in bread? But, of course, gluten-free bread is a version of bread. Turkey burgers, veggie burgers, salmon burgers, these are all versions of hamburgers even though they have no beef.

So Corona Hard Seltzer is an innovative product that, going back to the definition your Honor asked for, differs in certain respects from malt-based malt beverages, but is clearly a form of the same type of thing.

THE COURT: Everything differs in some respects from everything else.

MR. ATKINSON: Understood, your Honor. But the idea that there is some reasonable interpretation of a version of malt beverage that does not capture Corona Hard Seltzer is hard to fathom. We can come up with hypos, of course, and the fact

that your Honor asks about chardonnay and Cabernet Sauvignon and says, is that captured, is just a testament to how broadly the parties wrote this definition of beer. Capital B Beer, they could have called it bananas. It's the term, but it includes more than just lowercase beer, what you would consider in a Heineken or a Bud Light. It includes malt beverages. Then it goes on to include any versions of malt beverages.

And, by the way, elsewhere in the agreement, it says that Constellation has more or less free rein, as long as they are within that definition, to create entirely new recipes, with no reference to malt or hops or barley. There is a provision in this agreement, I think it's 215(g), that says that Constellation cannot pour liquor into capital B Beer unless ABI does so first. That's, of course, a reservation of rights for ABI. Without that, of course, the parties were concerned that someone might be able to pour rum, or vodka, or tequila, or whiskey into, quote unquote, beer, so malt beverage, traditional beer, etc., and still be covered by the license.

This is an extremely expansive definition. And given, your Honor, that the parties, sophisticated, clearly -- Anheuser-Busch is the biggest beer maker in the world -- came together, used lowercase B beer, used lowercase MB malt beverage, included versions as well, and now come to court and claim that they weren't including beverages, that are regulated

and treated by the government and by the parties as exactly those things, is a departure that, we would submit, is unreasonable in light of the language of the contract.

THE COURT: I think I have your point.

MR. ATKINSON: OK.

THE COURT: Mr. Steinberg.

Thank you, Mr. Atkinson.

MR. STEINBERG: Your Honor, I have a couple of slides that I have prepared, if that's acceptable, your Honor.

THE COURT: Yes.

MR. STEINBERG: Your Honor, we are here today on a motion to dismiss at the very commencement of an action. And the question that the Court is going to have to grapple with on today's motion is whether or not Modelo has plausibly alleged that a sugar-based Corona Hard Seltzer is not included in the sublicense definition of beer. And I think on a motion to dismiss, particularly, I don't think there is much doubt that the motion has to be denied.

I am going to talk about four things today.

THE COURT: There is one thing you can all agree on, and that is that you're both certain of your positions.

MR. STEINBERG: Your Honor, I am sure everybody feels about it as passionately as we do, but we think we have the law on our side on this motion.

I would like to first talk about the parties' choices,

because the parties had choices. I also want to talk about the plain meaning of beer, lowercase B and lowercase version. And then talk about Constellation's efforts to avoid that, which we believe are flawed. And, finally, a point that Mr. Atkinson didn't raise is, the question is whether or not this can, and the trade uses and the trade names, qualifies as a Mexican-style beer. A point that requires consumer testing to actually understand because that's the phraseology of the agreement.

So, in my perspective, the parties had a number of choices that had to be made when evaluating what to do under this contract. And they had a lot of choices.

So, of course, they had the possibility of a bespoke definition, the plain language, and not using any regulatory world.

They, of course, had the choice, too, of using a regulatory definition, like the Internal Revenue Code, or the New York alcohol and beverage code. They had those choices, and they were certainly available to them.

Similarly, they had the choice of the DOJ complaint, which defined beer to include flavored with hops and coming from malted cereal. Similarly, they had the DOJ final judgment that also had an alternative definition. And under both of those definitions, by the way, Corona Hard Seltzer would not be determined to be a beer.

Finally, there is the TTB, which has its own definitions of malt beverage. And under that definition, it would not be a malt beverage either.

So I think there are a series of choices that the parties had, and the parties did make a choice, but they rejected and did not adopt any of these other alternatives.

So what did the parties do instead? The parties actually set forth how this sublicense was going to be construed. And the parties had a section in the sublicense, following the definitions, talking about the construction of that agreement and said, unless the context otherwise requires, references to statutes shall include all regulations promulgated thereunder, and except to the extent specifically provided below, references to statutes or regulations shall be construed as including all statutory and regulatory provisions consolidating, amending, or replacing a statute or regulation.

If the parties wanted to invoke a regulatory regime, they knew exactly how to do it, and the contract told them how to do it. And that's what they did for several examples. We have just highlighted three here.

First, in a trademark license agreement, of course you are going to talk about what is confusingly similar. And there, the parties referred to the federal trademark law. And they were quite specific about it, as determined by in federal courts in the state of New York. So the Ninth Circuit's law on

that is going to be immaterial. They were being precise.

Similarly, abandonment. If someone abandons the mark, they are going to use the federal test for abandonment.

And similarly, if there is a bankruptcy, they are, as well, going to use the bankruptcy code.

So the parties had a method, the parties had a tool, had they wanted to do that.

And the parties, when we agreed with Mr. Atkinson, of course, these are very sophisticated parties; they were creating the third largest beer company in the United States through this very transaction. And the parties used -- I can't emphasize this enough -- they used the first four words of the Internal Revenue Code and struck the rest. The parties did not adopt the parts of the Internal Revenue Code which Constellation finds to be critical, the ability to substitute. That aspect was removed.

And, of course, the contract was both broader than the Internal Revenue Code definition, because this allowed the parties to also have nonalcoholic versions. So a nonalcoholic version of a Corona Extra or a Corona Light. But it also, too, was narrower because we removed substitutes from that definition.

So here, again, the parties were certainly knowledgeable about this definition and made clear that they departed from it. And just because there is a regulatory

scheme out there, that doesn't mean that the parties *ipso facto* always adopt it no matter what, no matter how. The parties always have choices, and the parties could exercise their choices, which is what they did here.

Let's go to the next.

One other brief thing. There has to be meaning to this at some point. They want to argue that a malt beverage, they say now -- in their papers, principally, this was a beer lowercase B. But now it has evolved into a malt beverage. But there is no malt in what they want to have as a malt beverage. They have, I guess, a non-malt version of a malt beverage, which seems to violate any norm of what is the thing we are talking about in the first instance. And again, that's not what the parties negotiated for, it's not what the parties adopted, and it shows the rejection of that type of logic, that type of position.

Now, how do we interpret this contract? And why shouldn't we use the plain and ordinary language? Everyone knows what a beer is. Beer has hops, it has cereal, and it is flavored. It is malted and flavored with hops. That's what the Webster's Third New International Dictionary says. Webster's New Twentieth Century defines it as an alcoholic beverage made by brewing and fermentation from cereals, usually malted barley, and flavored with hops and the like for a slightly bitter taste. The American Heritage Dictionary says

it's a fermented alcoholic beverage brewed from malt and flavored with hops. Those are what beers are.

Now, the Minnesota Court of Appeals looked at this very question, asked the question, Well, what is a beer? And they specifically rejected the notion that the Internal Revenue Code should control.

Now, we are not citing this case as controlling authority because it's not. It's the Court of Appeals of Minnesota, and we don't think it is controlling. But we think it is helpful and instructive that a court, looking at this question, would go back to the plain meaning and would not look at the tax code to supply an answer that no one else is supplying.

But what I think is most critical to today's conversation, your Honor, is that the very two statutes that they want to adopt -- the Internal Revenue Code or the New York Tax Law -- themselves use lowercase B beer. And, of course, statutes, and we cited in our brief the *Deutsche National Bank* case just because it's such an obvious point, but statutory interpretation must begin with the plain language, giving all undefined terms their ordinary meaning.

Beer is beer. We know what it is. We know what it tastes like. And we know what comes in this can, the liquid inside here, does not look, does not taste, does not pour, does not have any of the sensory attributes attributable to a beer.

I am fine that the person walking into the pub, they would be disappointed if they asked for a beer and got a hard seltzer. Similarly, a person asking for a hard seltzer would also be disappointed if they got a beer. The two are distinct items.

I would remind the Court, although it's clearly in the mind of the Court, when they applied and they used Modelo's name to apply to United States PTO, they said a couple of things about it. First of all, they said that it excludes beer. They said that their product was going to be a hard seltzer that excludes beer. And then they called it a malt beverage, too. But it has no malt, it excludes beer, and Corona Hard Seltzer is not a defined term, it's not part of the agreement. There is nothing in there that identifies that a sugar-based version of a beverage would qualify here.

THE COURT: Why did it take your client so long to make the claim?

MR. STEINBERG: First of all, it's well within the statute of limitations period.

THE COURT: No one is talking about the statute of limitations.

MR. STEINBERG: A couple of things. When they originally filed, and this is beyond the motion, of course, but when they filed, they told us in those filings that it was a malt beverage, and we had to look. We have agreed in the past,

if it is malt beverage, that's what the contract says, that's what we will allow.

There is actually a long history about flavored malt beverages under the alcohol laws, which I won't bore you with. But we were fine. Malt beverage. OK, they can do. And we worked with them to produce it. So the notion that we are squashing innovations is not borne out by the facts, remotely.

So we worked with them and allowed it to come to market.

THE COURT: It's only the successful innovation that you're upset about.

MR. STEINBERG: No. We are upset about the innovation that belongs to us. This is our product. This is Modelo's. This is outside of that agreement. And it is up to Modelo, not Constellation, to bring a product like this to market, should it decide to do so. But it is Modelo's. And it is not Mexican-style.

So what took so long? We did have a little bit of a pandemic, which required us to re-innovate our entire business structure for Modelo and Anheuser-Busch. Bars went away. Sporting events went away. We had to change an enormous amount of circumstances. So those issues, involving the health, the safety, and the welfare of the business, those took priority at a time when those priorities were important.

There is a procedure under the agreement. There is an

ADR. That took time. So it's not like we just sat around and did nothing. We had a full-on ADR, which was confidential, and we met that as a prerequisite to bringing suit.

All of those, we suggest, it's hardly unreasonable delay. We were working fast. We had to establish priorities. And we are here today. We are prepared to go forward. But I don't believe that there is any type of laches that would apply here, and they are certainly not raising it, nor could they, of course, at this particular point in time.

So, again, in their presentation to the USPTO, they called it a malt beverage. So we had to make sure. And when did we learn that it didn't? When we finally got ahold of a can, and it doesn't use the word malt anywhere in this can. In fact, it says alcohol from sugar.

Now, it does say beer. Beer right there. It's about -- I need my glasses to read it. It's good lighting in here so I can definitely read it. And, by the way, that beer is required so that they can get the lowest tax rate that the United States allows on alcohol.

So it was in their economic interest to choose to call it a beer. And under the Internal Revenue Code, we don't dispute that it would be a beer. We dispute, however, that the Internal Revenue Code is the body of law you would turn to to evaluate anything related to this particular dispute.

So Constellation seems to avoid the parties'

deliberate choice not to adopt the Internal Revenue Code. And so, instead, there is supposedly this -- on their opening brief -- consistent regulatory definition. Well, that was a promise that they couldn't meet. There was no consistency to that regulatory definition. And they continue to use words like industry participants, industry terminology. And yet they don't use the word trade usage, which I find instructive. Because if they used the word trade usage, that would require fixed and invariable terminology. Not the case here. It's not the case. And that's the *Law Debenture* case that we cited to your Honor.

One more word to that: Uniform. Fixed, invariable and uniform. They can't possibly meet that standard. 35 states, 14 states, whatever they want to say. And, by the way, the law today is influx. We cited to your Honor that Oregon started out, this was a wine. Now, they made it a beer. OK. But whatever that is, that definition is not uniform. And it's not surprising either. Of course, states want to make laws easy. So if they are going to adopt the United States Code on taxation, it makes it easy. It makes it easy for manufacturers. But not all states do it. And that was the point.

So it can't be trade usage. So instead of being trade usage, they have the *Hugo Boss* argument. Let me get to *Hugo Boss* first because it's the Second Circuit. But in *Hugo Boss*,

there were a couple of really important points.

First of all, in *Hugo Boss*, the meaning -- this was an insurance case determining a trademark slogan, what a trademark slogan meant under an exclusion in an insurance contract. And with that potentially ambiguous phrase, the trial court had considered slogan alone as the definition, and the Second Circuit said, no, it's potentially ambiguous because of this trademark slogan. Trademark slogan refers to federal law. And, by the way, the vast majority of the courts of appeal had determined already what the meaning of trademark slogan was, so you're going to be saddled with that definition.

That has nothing to do with this case. And *Hugo Boss* only established, by the way, a presumption of that, that that's what the parties selected as a presumption. That's not the case here. First of all, it's not ambiguous. No one is claiming the word beer has any ambiguity in this context. Nor are they claiming malt beverage has any ambiguity. Malt beverage requires malt. It's as simple as that.

Now, instead, when you are looking at the *Hugo Boss* case, *Hugo Boss* says, OK, we are going to presume that the parties meant to rely upon the federal trademark law. Of course, they were interpreting an insurance contract that was dealing with incidents and events that would trigger trademark liability. So, of course, it was a very close connection between the body of federal law that they were going to look

at. Not so here. I am still puzzling myself over what is the connection between United States tax laws and a sublicense of trademarks? I don't get it. There is a tax provision in the sublicense agreement. It makes no mention of this.

In fact, we are back to the question that I started out with, which is, did the parties reject that, as they are free to do under the *Boss* case. We actually cited a case called *Setlow*, your Honor. And in *Setlow*, after looking at *Hugo Boss*, the *Setlow* court said, hey, if you use a defined term, and define it differently, we are not going to impose the *Hugo Boss* presumption upon you. And that's exactly what happened here, your Honor. We had the construction, Section 1.2. Section 1.2 says, if you are going to incorporate a statute, go ahead and do it. And then we had a defined term for what is beer. That defined term does not reference, does not do anything with respect to the tax code. And, again, that's assuming that you would look at the tax code. It seems quite puzzling.

So for that reason, we reject the notion that the parties have somehow incorporated, but it's more than that.

Let's go to reason number 2, Colin.

Also, the statutory schemes themselves do not import a great expansiveness. Each of these provisions say, For purposes of this chapter. Not, For purposes of all contracts made in the state of New York. No. For purposes of this

chapter. And where a plain meaning of a statute restricts the use in the definitions, well, then, they are going to honor that.

Now, admittedly, in the *Murphy* context, a case we cited, that was two competing statutory schemes. But there is really effectively no difference. Why would you say, if it's for purposes of this part, that you could use it more broadly? And we have cited, to that end, your Honor, we have cited Corbin on Contracts. And Corbin says that statutory glossaries, which give definitions of words and phrases, are intended to be used to interpret the particular statutes and not to interpret contracts made by individuals. In other words, you can't import those into a private contract.

THE COURT: Well, it can be some evidence, can't it?

MR. STEINBERG: It could certainly be evidence, your Honor. It could be. But you have to look at the contract as a whole and determine whether or not they have rejected those statutory glossaries, as I think the record here is fairly clear. Again, the parties used the first four words of the federal tax code and then got rid of the rest.

So I think on that ground alone, we have sort of moved past the incorporation by reference, or, as I like to say, incorporation-by-silence argument that Constellation is making.

So let me -- and I have already discussed this, that they are sort of flirting with the trade usage, which we think

can't be done because they don't meet the standard. And that's why their brief started out saying that there is a constant and uniform treatment for this, which is simply not true.

So that brings us --

THE COURT: New York, in fact, has something called the general construction law that by statute defines any number of different terms, doesn't it?

MR. STEINBERG: It does, although I will confess my lack of familiarity with it.

THE COURT: Well, it doesn't have beer listed, but it defines things like property, person, day, month, men. I imagine it defines women. Yes, it does. Village, gender, day. Kind of an interesting fact, isn't it?

MR. STEINBERG: It certainly is, your Honor.

And if the parties wish to depart from that, I presume they have to be quite express to say that they are not adopting those.

THE COURT: Well, it underscores your point about not using terms defined in, for example, the New York Tax Law in other contexts as being definitive where the tax law says for purposes of this act, or words to that effect. That's the reason I raised the issue.

MR. STEINBERG: We are in 100 percent agreement. We think that "for purposes of this chapter" is a big red warning light to anybody that you can't expect that your contract

between private parties is going to impart that definition unless you are express about it. If you want to be express about it, there is no law that says you can't come up with whatever definition you want. And the parties here, we agree, are sophisticated parties who had choices available to themselves.

So we now then turn to the sort of limitless effort by Constellation to use the word version to mean something that is beyond a beer. I will say one thing. There is one thing upon which we agree. There is the provision, which is 2.13(c) -- let me see if I wrote it down -- which allows the parties, if Modelo decides to come out and produce in certain countries a beverage that combines distilled liquor and a beer, we would allow that and that would be permissible under the agreement. But that point is made expressly in the definition of beer when it says combinations.

So if I want to have a beer and tequila combination, I can have it, provided that the other terms of the contract are all adhered to. But combinations are allowed. But again, combination is the most obvious reinforcement that it has to be a beer. But version, too, version as well is also a reinforcement. The example I like is, I like the chardonnay one, too, but I also like a tricycle is not a car. They are similar. They are points of transportation. There is an engine in one. There's three wheels. There's four wheels.

One is made for a child. One is made for an adult. You don't need a license for one. They are both versions of transportation.

THE COURT: It's funny you mention that example because only last weekend I was present when a big burly guy, with a bandanna around his head and a Harley Davidson shirt, took nearly violent exception to somebody's reference to a three-wheeled vehicle with a sidecar on it as a motorcycle.

MR. STEINBERG: Your Honor, we all have our passions and interests, I would say.

THE COURT: Well, that's not one of mine, but I thought it was apt.

MR. STEINBERG: I would say words have to be given, at the end of the day, their ordinary usage. I would say, too, if you look at their opening brief, version meant a particular form of something. By the time of their reply brief, now version is, if just one person calls it a beer, then it's a version of a beer. But, of course, that violates the rule that says you have to have a reasonable interpretation of agreement. The fact that someone might be confused does not make a Corona Hard Seltzer a version.

I will conclude with one last point, which is that this is not a Mexican-style beer. How do we know that? Well, the contract itself, the sublicense says, what is a Mexican-style beer? It's a Beer, capital B, which includes

lowercase B, bearing the trademarks, i.e., there is the trademark right here, Corona, the Corona crown. Corona, by the way, in Spanish means crown. That does not bear any trademarks, trade names, or trade dress that would reasonably be interpreted to imply to consumers in the territory, in the United States, an origin other than Mexico. So it worked. I don't have to pay attention to the "imported from Mexico" at the bottom. I have to pay attention to the trade name and trademarks and the trade dress.

So do people seeing cherries with the word sparkling water, does that resonate with them Mexico? Does the phrase hard seltzer resonate to them Mexico? I would submit not. I would submit that clearly consumers would not -- hard seltzers were developed in the United States long after this sublicense was executed, your Honor. And it is a distinctly American phenomenon. So we will have that question, but that is not a question that can be resolved on this motion at this time.

So absent further questions, your Honor, I will sit down.

THE COURT: Thank you very much.

Mr. Atkinson, briefly, please.

MR. ATKINSON: Thank you, your Honor.

Mr. Hill, would you mind just putting up slide 2 again.

So, your Honor, counsel mentioned that the parties had

rejected these other definitions. There is, of course, no evidence of that in the record. But setting that aside --

THE COURT: Other than the fact that they didn't use them.

MR. ATKINSON: They didn't, your Honor. But they did include a catch-all of "any other versions" in their definition. That is broader, I believe, than any, if there are any, catch-all provisions in any of these other agreements.

Clearly, these other definitions are versions of beer, right? I mean, these are regulatory definitions of beer that counsel concedes the parties must have had in mind when they were negotiating this contract. So the parties picked the first four or so words. They add malt beverages and they say, "and any other versions or combinations of the foregoing."

I mean, that is about as broad as it gets. And counsel has stood up and talked for 30 or so minutes and still has not told us what "versions" means. If it's not beer, and if it's not malt beverage, then it's not a version of either.

Counsel says that a tricycle is not a version of a car. But that a tricycle and a car are both versions of transportation. OK. So Corona Hard Seltzer is a gluten-free version of malt beverage. They are both also versions of alcoholic beverages. Corona Hard Seltzer is a version of a beer. It's regulated as such. It's referred to as such by industry participants. The definition, all I am saying, your

Honor, is extremely broad, and the use of the word "versions," of course, captures all of these that counsel has indicated expressly the parties rejected in negotiating their agreement.

The red line -- of course, I think your Honor knows this -- that counsel has included in their presentation and in their brief, that's made for litigation. There is no marked-up document in which the parties struck the language from the tax code. I will again say, though, your Honor, that the language we added, the parties here added, at arm's length, after beer, ail, porter, stout included malt beverages and any versions of any of the foregoing. That's broader than any of the definitions we have here.

There was a lot of discussion, your Honor, from counsel about beer. It's capital B Beer. This is the shorthand, I guess, folks are using in this case. But let's not lose sight of malt beverage. Malt beverage is not a term that is used in *Chalet Liquors*. Malt beverage is not a term that counsel has turned today to the dictionary to define. Version is not a term used in *Chalet Liquors*. Versions is not a term that counsel disputes our definition of. If this is a version of a malt beverage, and there is no plausible argument to the contrary, we would submit, just like a gluten-free bread is a version of bread, a gluten-free malt beverage is a version of malt beverage, then these efforts to make this case all about that yellow liquid that comes in the dark glass bottle,

and that smells and tastes like beer, sort of fall away. It's more than beer. In this definition, it's versions of beer, it's malt beverages, and it's versions of malt beverage.

So when counsel talks about someone saddling up to the bar and asking for the beer and they get a malt beverage instead, would they be disappointed? I don't know. They might not think it's traditional beer. If they saddled up to the beer and asked for a Corona Refresca and got a Corona Hard Seltzer, I don't think they would notice the difference. These are versions of malt beverage.

The PTO argument likewise. We made submissions to the PTO. Counsel focuses on beer. We didn't classify it as the beer classification. News flash. We classified it as the malt beverage classification. And malt beverage expressly included in the parties' definition.

Counsel made an argument that I think is not accurate under the agreement. Counsel said that, because of the combinations language that you can see here on the screen -- I may have touched it -- because of the combinations language that you see here on the screen, even without Section 215, Corona was permitted to pour distilled liquor into its beer. That's not right. The definition says, Beer, ail, porter, stout, malt beverages, and any other versions or combinations of the foregoing. I don't believe counsel is arguing that tequila fits within beer, ail, porter, stout, malt beverages.

Of course, if he is, all the better for our case. But I don't think he is. I think clearly what is going on in 215, when you read it in conjunction, as you must, with this definition, is that there was a concern that this was broad enough to capture all kinds of different things and they had to dial it back. That's a minor point.

On Mexican beer, your Honor, the can, as counsel pointed out, says imported from Mexico. In order to meet the standard under the contract, they must point to something that would reasonably be interpreted to imply to consumers an origin other than Mexico. I mean, it says right there that it's from Mexico. In fact, it is from Mexico. It's produced there. Counsel says that hard seltzer is a uniquely American drink. I don't think beer was developed initially in Mexico. Beer was developed in Germany. So the argument that a hard seltzer is not Mexican is sort of hard to fathom. And, of course, I should add, Corona Refresca has been on the market for a while now. It has never been challenged by ABI. Every argument they have made about this being not a Mexican-style beer would apply to Corona Refresca. They have not made the argument before. It doesn't work and it doesn't work here.

Unless your Honor has further questions, I will sit down.

THE COURT: Thank you.

I have to say I thank all the lawyers on this case. I

don't really remember a better developed interpretation argument of a statute or a contract that I have ever seen, and you both did spectacular jobs, and I appreciate it, and I admire it, I will tell you frankly. And I never said anything like that before. Just ask the people I used to practice law with.

You have both proven the accuracy of Justice Frankfurter's famous statement that words can be empty vessels into which one can pour anything you will. And you have both not only poured an awful lot into these words, but you have raised quite a head on the glass.

I started reading the papers, which are enormously persuasive on both sides, and initially thought that this was a very complicated case. And I practiced years back with a lawyer who said, when things seem to be that complicated, if they are going to be solved, there is a simple answer and your job is to find it. And the short answer is that there are enormously well stated and strong arguments on both sides, but they are arguments about how the word and the clause in the contract should be construed. And it is not, in my judgment, a question of law; it is almost certainly a question of fact. And I am denying the motion to dismiss because there is a perfectly reasonable and plausible argument for the plaintiff. It may or may not prevail in this case because there are perfectly reasonably and strong arguments for the defendant.

So that's where I am coming out. I don't know if we will ever get to a summary judgment stage in this case. And I won't prejudge that because I could imagine records that would be very strong one way or the other. But I think it's time to talk about a schedule and conceivably a trial date. So let me hear what you think about how long it will take you to get to that point.

Mr. Steinberg.

MR. STEINBERG: I would think that we could be at a summary judgment point by June of next year, a year from today.

THE COURT: Mr. Atkinson.

MR. ATKINSON: Your Honor, I don't expect it would take that long.

THE COURT: Neither do I.

MR. ATKINSON: But we are prepared to confer with plaintiff. Our expectation is we can do it in less time than that, let's call it half that time.

THE COURT: Mr. Steinberg, explain to me, what is going to take a year?

MR. STEINBERG: Your Honor, I am sort of of the school that things actually are always slower, that lawyers are really bad at estimating.

THE COURT: Not in this courtroom.

MR. STEINBERG: I usually take my initial estimation and multiply it by two because I always make it too short.

Look, I'm the plaintiff. If you gave me a trial date three weeks from now, I would go to trial three weeks from now. So I am happy with a much earlier date. I have one other significant series of trials that come in that sort of March, April, May period that are in Texas, but other than that, I am at the Court's discretion to take on this case and move it forward.

THE COURT: How much discovery does there need to be?

MR. STEINBERG: We think as to the interpretation issues, not so great. There is going to be some discussion and there will be, of course -- I don't think it should be that much. Then the question about remedy and damages and all of that, that will be more significant. That will take a while to develop because I don't know if they are going to have a button that I can push and they will tell me every cent that they have made and every cost. My experience is that that type of information is hard to pry out of a corporation's records and that it's not the easiest thing in the world, especially in these types of cases.

THE COURT: Suppose damages were severed?

MR. STEINBERG: That actually was an idea that we had floated with the plaintiff. We thought it would be best, especially given the overhang of their competitive view that we are somehow bullies here. But I don't need to see their financials until we are past summary judgment. I would be

happy to have a much shorter period to get to summary judgment, let's say by January, and proceed in that way. Then, assuming we pass that, then we will deal with where we are on damages and other remedies.

THE COURT: Mr. Atkinson.

MR. ATKINSON: Your Honor, might I suggest that the parties confer? What I am hearing from counsel is that there may be common ground here. We may be able to reach an agreement on the appropriate way to proceed. I would like to confer with my client, for example, on the question of whether to bifurcate the analysis, the liability versus damages. Our expectation is that we could move to summary judgment with some haste, that this will not take a year in discovery, but I would ask the Court's permission to confer with my adversary and get back to you promptly with a proposal.

THE COURT: Well, it's not unreasonable. Today is Wednesday. Can you get back to me by, say, Tuesday?

MR. ATKINSON: Yes, your Honor.

MR. STEINBERG: Yes, your Honor.

THE COURT: I would like a joint letter, and we will take it from there.

I meant all the nice things I said.

MR. STEINBERG: Thank you, your Honor.

MR. ATKINSON: Thank you.

(Adjourned)